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(3)

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No._____

In The

Supreme Court of the United States

October Term, 1991

Richard C. Soehngen,

Petitioner,

v.

Merit System Protection Board,

Respondent.

APPENDICES

VOLUME III OF V VOLUMES

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

RICHARD C. SOEHNGEN, Appellant,	)	DOCKET NUMBER DC07529010604
v.	)	
U.S. DEPARTMENT OF JUSTICE Agency,	)	

APPELLANT'S SUPPLEMENTAL
SUBMISION TO THE RECORD

Appellant, Richard C. Soehngen, by and through his counsel, Neill, Mullenholz & Shaw, herby submits the Fact-Finder's Report and Recommendations, Roger P. Kaplan, Eq., Fact-Finder (Report).

The Report is submitted for inclusdion in the record because the Report is directly relevant to the issue pending before the Administrative Judge concerning Mr. Soehngen's appeal filed on or about August 28, 1990. The Report is relevant concerning the following issues:

1. The issue of jursidiction pending before the Administrative Judge.

2. The appellant's position that he has appeal rights in this proceeding.

3. The appellant's position that he has a reasonable expectation of continued employment.

4. The appellant's position that he was denied his due process rights because the agency removed him from his position without providing him the procedures required by 5 U.S.C. § 7513.

The report found that the agency violated FPM Chapter 362 by extending Richard Soehngen's Presidential Management Internship (PMI) for a third year (Report, p. 17). The report recommended that Mr. Soehngen be retroactively converted to a career civil service position at the GS-11 level as of August 24, 1989 (Report, p. 17)

The Report resulted from a full evidentiary and adversary hearing held on May 30 and 31, 1990, and June 18, 1990. In this hearing, both parties had the opportunity to examine and cross-examine witnesses, introduce documents and exhibits, and present evidence in support of their respected positions. A verbatim transcript was made of the hearings and the parties submitted post-hearing briefs on or about July 16, 1990.

The Report should be given substantial weight in terms of developing the evidentiary and legal issues surrounding the issue of Mr. Soehngen's right to be converted in the PMI program. As a result of the PMI program, Mr. Soehngen had a legitimate expectation of continued employment in the PMI program. Mr. Soehngen had a legitimate expectation of being lawfully converted to a permanent position on or about August 24, 1989, after two years in the program. Therefore, but-for the agency's unlawful conduct in failing to convert Mr. Soehngen on August 24, 1989, Mr. Soehngen would have been converted and would have been entitle to all procedural and substantive rights provided to career civil service employees.

The Report support's Mr. Soehngen's claim that he had a legitimate expectation of continued employment. This expectation is based on the conduct of ageny officials, Mr. Soehngen's successful performance in the PMI program, the nature of the PMI program, and the significance of the agency's unlawful failure to convert Mr. Soehngen in August 1989. In light of the above, the Report is relevant converning all of the issues addressing herein.

The submission of the Report will not prejudice the agency because the agency was a party represented by counsel throughout the fact-finding procedures at issue in the Report.

Wherefore, for the aforementioned reasons, the appellant respectfully requestes the attached Report be included in the record for consideration surrounding all of the issues pending before the the Administrative Judge concerning Mr. Soehngen's appeal, including but not limited to the issue of jursidiction.

Respectfully submitted,

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APPENDIX G

UNITED STATES DEPARTMENT OF JUSTICE

In the Matter of:	)
	)
RICHARD C. SOEHNGEN,	)
Grievant	)
	)
and	)
	)
UNITED STATES DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW	)
	)
Agency	)

FACT-FINDER'S REPORT AND RECOMMENDATIONS
ROGER P. KAPLAN, ESQ., FACT-FINDER

APPEARANCES:

For Richard C. Soehngen:	Steven L. Murray, Esq. William L. Bransford, Esq.
For U.S. Department of Justice:	Mary E. McGee, Esq. Kenneth C. Kohl, Esq.

BACKGROUND

Pursuant to Department of Justice Order DOJ 1771.1B, Mr. William C. Owen,Assistant Director of Personnel, U.S. Department of Justice (Agency) designated the undersigned as the Fact-Finder to conduct an inquiry into the grievance filed by Mr. Richard C. Soehngen (Grievant). The grievance was processed in accordance with the provisions of Title 5, Code of Federal Regulations, Part 71 and Department of Justice Order DOJ 1771.1B.

On May 29, 1990, the Fact-Finder held a pre-hearing conference. Hearings were held on May 30 and 31, 1990 and June 18, 1990 in Washington, D.C. Both parties had the opportunity to examine and cross-examine witnesses, introduce documents and exhibits and present evidence in support of their respective positions. A verbatim transcript was made of the hearings. The parties submitted post-hearing briefs on approximately July 16, 1990. On that same date, the Grievant filed a Motion to Strike based upon two attachments submitted by the Agency with their post-hearing brief. On August 1, 1990, the Agency submitted an Opposition to the Motion to Strike.

ISSUE

The parties agreed upon a stipulation of two issues. They are:

1. Did the United States Department of Justice (Agency) violate Chapter 362 of the Federal Personnel Manual (FPM) by extending Richard Soehngen's Presidential Management Internship (PMI) for a third year?

2. Whether the PMI extension was an unlawful reprisal for Mr. Soehngen having filed an initial grievance on approximately May 12, 1989 on his performance appraisal?

FACTS

Richard Soehngen is employed as a Program Analyst, GS-301-11, in the Criminal Alien Unit in the Office of the Chief Administrative Law Judge. The office is part of the Executive Office for Immigration Review of the United States Department of Justice, located in Falls Church, Virginia. Soehngen is employed in the Presidential Management Intern (PMI) program.

Soehngen entered the PMI program on August 24, 1987 as a Program Analyst in the Military Traffic Management Command, United States Department to the Army in Falls Church, Virginia. He occupied this position until January 11, 1988.

On October 27, 1987 and November 15, 1987, Soehngen interviewed for a position in the Executive Office for Immigration Review, U.S. Department of Justice with Chief Immigration Judge William R. Robie. On approximately January 11, 1988, Soehngen transferred to the Agency to assume a position of Management Officer, GS-301-11 in El Paso, Texas. As a Management Officer for the El Paso Office, Soehngen served as the principal liaison in administrative and management matters with the Office of the Chief Immigration Judge. He was the first line supervisor in the El Paso Office. Soehngen has responsibility for the administrative handling of cases in his office. He was responsible for keeping track of the cases on the calendar of the administrative judges. Soehngen occupied the position of Management Officer in El Paso from January 11, 1988 through July 31, 1988.

The Agency needed a Program Analyst in its Falls Church Office. At the direction of Chief Judge Robie, Assistant Chief Immigration Judge Mary Ann Mohan considered Soehngen for this position. She interviewed Soehngen in Texas for the vacancy. On June 10, 1988, Chief Judge Robie offered the position of Program Analyst in the Criminal Alien Unit to Soehngen. In the letter, Chief Judge Robie stated:

> You will, of course, continue to participate in the Presidential Management Intern Program. You can expect to be promoted to GS 11/1 when you become eligible (PMI entry on duty date, August 23, 1987). Longer term

career development potential to the GS 12 (at internship conclusion) and GS 13 levels, based on job performance, are associated with this position at OCIJ.

Soehngen accepted the position of Program Analyst in the Falls Church Office and started working there in August, 1988. When he assumed the position of Program Analyst, his grade was GS-9. In approximately two weeks, on August 24, 1988, Soehngen was promoted to the GS-11 grade level. His present grade level remains at GS-11. From August 1988 until the present date, Soehngen's immediate supervisor has been Judge Mohan.

In his current position, Soehngen provides analysis for the Criminal Alien Program. This involves keeping reports and providing liaison with management offices in the field regarding the deportation hearing requirements at the different state and federal correctional institutions around the country.

On January 13, 1989, Judge Mohan conducted a progress review of Soehngen's work performance. There was no written documentation of that progress review. Mohan testified that she discussed with Soehngen the work plan, the caseload analysis and the reporting responsibilities that he was handling. Judge Mohan stated that she discussed with Soehngen areas in his work that needed improvement. Soehngen testified that the progress review was a very favorable and positive exchange. He claimed that Judge Mohan told him specifically that he would either receive an excellent or outstanding rating at the end of his performance appraisal period.

During the Spring of 1989, Soehngen applied to law school. On April 25, 1989, Chief Judge Robie wrote a letter of recommendation for Soehngen. In pertinent part, Chief Judge Robie stated as follows:

> . . . I have had an opportunity to see Rick's work and intellectual fervor since he joined the Executive Office for Immigration Review in January, 1988 . . . He has spend most of his time since July, 1988, assisting in the coordination and establishment of our hearing program for incarcerated aliens in corrections systems at the federal, state, and local levels. In particular, he has focused much

of his effort on the establishment of pro bono publico programs to assure that aliens are represented in these hearings. His concern and willingness to take that extra effort to assure that incarcerated aliens have access to legal counsel in these deportation proceedings have been particularly noteworthy.

On May 3, 1989, Soehngen received a formal performance rating for the period for September 1, 1988 through March 31, 1989. Soehngen received a fully successful rating. Judge Mohan signed the appraisal on April 26, 1989 as the rating official and Chief Judge Robie signed the appraisal on May 3, 1989 as the reviewing official. Judge Mohan rated Soehngen in four critical areas. Soehngen received a fully successful rating in each of these four areas. In her narrative portion of the appraisal, Judge Mohan described Soehngen's work performance as follows:

> Critical Element No. 1: During his employment in the Criminal Alien Unit, Mr. Soehngen has been assigned various caseloads at large and specific program-related issues to analyze. His grasp and understanding of the detailed and analytical techniques required to fully evaluate this program and his ability to accurately perform these analyses with ACIJ supervision are growing.
>
> Critical element No. 2: During 1988,much of Criminal Alien Unit staff time was devoted to working with corrections officials to establish and effectively monitor CAP operations on an individual program as well a collectively on a national level. Rick assisted with various elements on state program implementation, and his coverage of both the Federal Bureau of Prison and military installation sites in Leavenworth, Kansas was very helpful at an important time.
>
> Critical Element No. 3: Much of this initial period of employment with the Criminal Alien Unit required Rick to assimilate a great deal of knowledge and information

regarding program implementation techniques and operating level systems. His ability to analyze and integrate programmatic information was affected by this initial need to learn and apply the systems in place.

Critical Element No. 4: Rick's contact with EOIR field office personnel on CAP matters has focused primarily on serving as a conduit for Management Officers who require program assistance. He has also served as the principal Criminal Alien Unit liaison with Management Officers in developing a forms/supplies checklist for ready reference by EOIR personnel preparing for prison hearings.

After receipt of his performance appraisal, Soehngen voiced his concern to Judge Mohan. On May 12, 1989, Soehngen filed a request to Chief Judge Robie through Judge Mohan for a performance appraisal review. This request focused on two major points: (1) the performance rating of fully successful; and (2) the failure of Soehngen to receive a performance appraisal for the period from January 11, 1988 through July 31, 1988.

On May 31, 1989, Judge Mohan requested of Soehngen whether he intended his memorandum dated May 12, 1989 to be a grievance. On June 1, 1989, Soehngen indicated that he would proceed with the formal grievance process. He advised Chief Judge Robie that his May 12th memorandum should be considered a formal grievance.

The May 12th grievance was processed through the fact-finding procedures outlined in the Agency's regulations. On October 30, 1989, Jack B. Newman, Grievance Examiner, issued his fact-finding report. Newman found that there was no requirement for Soehngen to be rated for the period from March 1988 to June 1988. Newman also concluded that Soehngen's request for a higher appraisal rating be denied.

In late April, 1989, management officials of the Agency commenced a personnel action regarding an extension of Soehngen's PMI. Samantha Matus, a Personnel Liaison Specialist, testified that on approximately April, 1989, she discussed with

Judge Mohan about an extension of Soehngen's PMI. Matus stated that Judge Mohan asked her to check into the requirements for requesting an extension in Soehngen's case. Matus testified that she made two telephone calls to Jim Annandale in the Agency Personnel Office to discuss what specifics would be needed if an extension request was submitted from the Agency to the Office of Personnel Management (OPM).

Matus made personal notes, which reflected that on May 1 and May 8, 1989, she inquired into the procedures for requesting Soehngen's extension. Matus stated that she met with Judge Mohan and her immediate supervisor, Suzanne Carroll, on May 10, 1989, to discuss the contents of the letter being set to OPM for Soehngen's extension. Matus wrote a note to the file on May 10th, explaining what occurred at the meeting. She wrote:

> Met with Mary Ann Mohan & Suzy today (5/10/89) at 3:00 p.m. to discuss extension of PMI, Rick S., based on insufficient time in Program Analyst Position. Mary Ann Mohan was to develop memo, . . . to be submitted to OPM . . .

Matus stated that Judge Mohan drafted a letter that would be sent to OPM requesting Soehngen's extension. On May 23, 1989, Warren Oser, Director of Personnel for the Agency, requested OPM's approval of the Agency's extension of Soehngen's PMI for a third year. In pertinent part, Oser stated:

> At this time, EOIR had determined that the period of Mr. Soehngen's assignment to the Criminal Alien Unit is insufficient to warrant career conversion in a program analyst position. Additionally, Mr. Soehngen's background investigation, which was initiated in December, 1987, has not been completed. Due to the extremely sensitive nature of managing the Criminal Alien Program, which requires constant interaction with prison officials and prison systems, it is impossible to convert Mr. Soehngen absent successful completion of this essential investigation.

On May 26, 1989, Patricia Paige, Chief of the Programs Division, Office of Affirmative Recruiting and Employment, OPM, wrote to Oser informing him that the Agency's request for Soehngen's extension had been granted. On June 14, 1989, Chief Judge Robie wrote Soehngen, informing him that his PMI had been extended for a third year. Soehngen testified that he learned of the extension on June 21, 1989 when he received Chief Judge Robie's letter.

Soehngen was absent from work June 6, 1989 through November 29, 1989 due to an injury. Soehngen returned to work after November, 1980 for this third year in the PMI program. As of the present date, he is still in his third year of the PMI program.

Beverly Jones, Manager of the PMI Program at OPM, testified that she received the Agency justification for Soehngen's extension in late July or early August, 1989. She admitted that these documents were the only documents received from the Agency to justify Soehngen's extension. No documents accompanied the extension request in May 1989.

Based upon the inability of the parties to resolve this grievance, the undersigned was designated as the Fact-Finder, as stated in the initial part of this decision.

ANALYSIS AND DISCUSSION OF ISSUES

The parties stipulated to two issues at hearing. They will be discussed seriatim.

ALLEGED VIOLATION OF CHAPTER 362 OF THE FEDERAL PERSONNEL MANUAL

Chapter 362 of the Federal Personnel Manual (FPM) sets forth provisions regarding the PMI program within the Federal agencies.

Specifically, Chapter 362-6, Extending Presidential Management Internships, deals with the extension of employees within the PMI program.

This paragraph states as follows:

> 2-6. EXTENDING PRESIDENTIAL MANAGEMENT INTERNSHIPS
>
> Federal agencies may request OPM approval for an extension of an internship for up to a third and final year. The primary reason for extending on internship is to provide the intern with additional training and developmental activities. The additional training should be structured to allow the intern to successfully fill a changed or more demanding position. Extensions for a third year will be the exception rather than the rule.
>
> In requesting an extension for up to a third year, agencies must provide the following information:
>
> -- The target position for which the intern is being developed;
>
> -- An individual Development Plan for the intern during the third year which contains specific assignments and learning objectives;

-- The reason(s) why the intern is not able to receive this training during the first 2 years of the internship.

A written request to extend an internship should be submitted to PMIP, no later than 60 days prior to the end of the initial 2-year period. This request must be sent to:

U.S. OFFICE OF PERSONNEL MANAGEMENT
PRESIDENTIAL MANAGEMENT INTERN PROGRAM
P.O. BOX 7230
WASHINGTON, DC 20044

Interns serving a third year of the internship will remain under the Schedule A appointment. If at any time during the third year the agency determines that the intern has achieved the objectives of the extended internship and has performed satisfactorily, the agency may the convert the intern to career or career-conditional status. Interns converted before the completion of 3 years will receive career-condition appointments unless they have had any substantially continuous Federal service prior to their internship which would be qualifying for a career appointment. At the conclusion of the third year, assuming satisfactory performance, interns can be converted to a career appointment.

The Agency request to extend Soehngen's internship was dated May 23, 1989, more than two months prior to the conclusion of his PMI on August 24, 1989. FPM Chapter 362-6 states that the Agency must provide certain information when requesting an extension. It is undisputed that the Agency did not submit the required information when the extension request was submitted. Beverly Jones, OPM's Manager of the PMI program, testified that the Agency's justification for the extension was not received until late July or early August, 1989.

In its request to OPM for approval of Soehngen's PMI extension, the Agency provided two reasons for its request. First, the Agency claimed the period of Soehngen's assignment to the Criminal Alien Unit was insufficient to warrant career conversion in a program analyst position. Second, the Agency maintained that Soehngen's background investigation had not been completed. Chief Judge Robie's letter to Soehngen dated June 16, 1989, reiterates the reasons as to why the Agency requested an extension.

The Agency stated in this letter to OPM that successful completion of Soehngen's background investigation was essential to convert him in the PMI program. The Agency asserted that the background investigation was initiated in December 1987. It further alleged that the sensitive nature of managing the Criminal Alien Program, which required constant interaction with prison officials, made his completion of the background investigation a requirement. Chief Judge Robie stated that the failure of a background investigation to be completed for Soehngen was a factor in his decision for requesting an extension. Chief Judge Robie also testified that he did not know of any regulation which precludes Soehngen from being converted from the PMI program to a permanent position absent completion of a background investigation.

The evidence shows that Soehngen started working in the PMI program on August 24, 1987. In December, 1987, Soehngen's background investigation was initiated. On January 13, 1988, the Agency contacted OPM and instructed them to discontinue the background investigation. On June 29, 1989, the Agency requested OPM to reopen Soehngen's background investigation. As of September 29, 1989, James Scott, Chief of the File and Information Branch at OPM, indicated the reopened background investigation was still in progress.[1]

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[1] In its post-hearing brief, the Agency submitted an OPM printout, which indicated that as of May 23,1989, Soehngen's background investigation was in progress, which contradicts evidence submitted at hearing. The Agency also submitted Chapter

My consideration of the Agency's two attachments submitted in their post-hearing brief does not convince me of the validity of their position. The Agency's reliance on the failure of Soehngen to have completed a background investigation cannot be used as a reason to support the extension request. Assuming arguendo, that a background investigation was required by FPM Chapter 732 or the Agency's regulations, it would be unfair and unjust for the Agency to have considered this as a reason for the extension request.

First, the Agency had the responsibility for assuring that Soehngen's background investigation was completed prior to the conclusion of his internship, absent extenuating circumstances, Soehngen played no part in the completion of the background investigation. Second, the Agency initiated the background investigation in December 1987, almost two years prior to the completion of Soehngen's internship. For whatever reason, the Agency instructed OPM to discontinue the background investigation on January 13, 1988. For the Agency to maintain that a valid reason exists to extend Soehngen's internship because of his failure to complete a background investigation, when the Agency terminated the investigation, is incredible. Third, Jones, the OPM's Manager of the PMI program, testified that there was no requirement pursuant to Chapter 362 of the FPM that an employee complete a background investigation prior to conversion as a permanent employee. Jones made no reference to Chapter 732 of the FPM as requiring Soehngen to have completed a background

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732 of the FPM, which it claimed provided that a background investigation was required for employees in Soehngen's position. The Grievant filed a Motion to Strike to deny the Agency's submission of the above-cited attachments. The reference to FPM Chapter 732 and its submission is not evidence, but rather argument in which the Agency sought to rely that a background investigation was needed by Soehngen. The submission of an OPM printout is pertinent and will be considered for the sake of this grievance only. The Grievant's Motion to Strike is denied.

investigation. Also, Jones testified that the background investigation played no role in the decision to approve the Agency's request for Soehngen's third year under the PMI program.

Based upon the reasons set forth in the preceding paragraphs, I find the Agency's reliance upon failure of Soehngen to have completed a background investigation as a requirement for successful conversion to the competitive service is misplaced and unconvincing. Any reliance by Agency officials on Soehngen's failure to have completed a background investigation prior to conversion must be rejected because of the Agency's role in discontinuing the background investigation itself. Having unilaterally acted to discontinue the background investigation, it cannot in good faith claim at a later date that Soehngen's failure to have completed a background investigation constituted a justifiable reason for his PMI extension. This rationale is applicable whether or not there was an ongoing background investigation at the time the Agency requested approval of the PMI extension.

The second reason used to support the extension request was the Agency contention that the period of Soehngen's assignment in the Criminal Alien Unit was insufficient to warrant career conversion. Pursuant to FPM Chapter 362, the Agency was required to submit its reasons for the extension when the request was submitted on May 23, 1989. The Agency failed to comply with this provision in FPM Chapter 362. Therefore, OPM's approval of the Agency request on May 26, 1989, could not have been based upon any substantive reason. Since the Agency did not submit its rationale for extending Soehngen's internship until late July 1989, the OPM approval could not have considered the three reasons outlined in FPM Chapter 362-6. Therefore, I find that the OPM approval dated May 26, 1989 to be based upon insufficient reasons and not worthy of consideration.

Since I find OPM's approval letter of May 26, 1989 to be perfunctory, I must examine the reasons proffered by the Agency in its May 23, 1989 request to OPM and its justification submitted in July for approval. In my judgement, the Agency's rationale must be scrutinized to determine whether the reasons advanced for

the extension are valid. While FPM Chapter 362-6 outlines the requirements for requesting extension, FPM Chapter 362-7 outlines the reasons for eligibility for conversion. In pertinent part, the OPM sets forth guidelines for conversion:

> 2-7 CONVERSION
>
> b. Eligibility for conversion. Employees who have completed Presidential Management Internships are to be converted noncompetitively to a career or career-conditional appointment for which they are qualified if all of the following criteria are met:
>
> > (1) The employee has successfully completed a Presidential Management Internship at the time of conversion:
> >
> > (2) The employee is recommended for conversion at least 90 calendar days before the completion of the internship. The agency decides whether or not to convert the employee. No recommendation is made to the OPM. Agencies are asked to inform the PMIP, U.S. Office of Personnel Management, when an individual will not be converted.

The language of Chapter 362-7 clearly suggests that the Agency decides whether or not to convert an employee. If the Agency does convert the employee, OPM regulations do not require that a recommendation be made to the OPM

Judge Mohan testified that Soehngen's tenure as a Program Analyst was insufficient to warrant conversion. She stated:

> It as insufficient for all the various aspects of the analytical abilities that were required of the future of a permanent program analyst in this staffing position.

> The time for orientation to the program, the time for the increasing responsibilities, the time for the assessment of the individual's abilities to perform in the duties and the changing nature of the program itself and changing of the department's focus, the Anti-Drug abuse act of limitation that I talked about, the impact of several legal changes, which, at that point, I could foresee impacting the case load management needs of our system.
>
> That, as combined consideration, led me to believe that Mr. Soehngen's ability to perform in this position required additional time in the position before any conversion favorable to him could be made.

Although Judge Mohan testified that she believed Soehngen needed more time as a Program Analyst before conversion to a permanent position, the weight of the evidence does not support such a conclusion. Most importantly, Judge Mohan rated Soehngen fully successful for the period from September 1, 1988 until March 31, 1989, a period of eight months. With respect to all four critical elements that formed a part of Soehngen's duties during this period, Judge Mohan rated him fully successful in all four elements. In the one element which was rated noncritical, Judge Mohan rated Soehngen as excellent. Judge Mohan's narrative comments regarding the four critical element hardly justifies her testimony that his analytical abilities were insufficient to meet the needs of his position.[2]

In addition, Soehngen has no performance standards in place from March 31, 1989 to May 23, 1989, the date the Agency requested his extension. Judge Mohan further testified that no performance work plan has been in effect since March 31, 1989.

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[2] Chief Judge Robie approved the performance appraisal as the reviewing official. His law school recommendation letter on behalf of Soehngen was praiseworthy and indicated no deficiencies with his performance.

Soehngen's position description was never modified during his tenure with the Criminal Alien Unit. His duties were never modified in any way. Soehngen was never informed of any change in the priorities of the Criminal Alien Unit during his tenure. Soehngen's critical elements never changed during this tenure in the Criminal Alien Unit.

Judge Mohan testified that she had some problems with a document that Soehngen submitted after his attendance at an American Bar Association sponsored pro bono conference in Miami in April 1989. Judge Mohan claimed that this memorandum did not tell her anything of substance regarding the discussion at the conference. Yet, on April 25, 1989, when she signed Soehngen's evaluation she had knowledge of this document. Yet, Judge Mohan rated Soehngen excellent in his performance appraisal rating in the pro bono area.

Judge Mohan testified as to deficiencies in a memorandum Soehngen prepared in February 1989. She claimed that percentages calculated by Soehngen were incorrect. In describing some of Soehngen's deficiencies in February and March 1989, Judge Mohan testified as follows:

> It is hard for me to recognize exactly when some of these deficiencies became very clear to me. There were things that were happening during the February analysis of calendars that at first I attributed to either a lack of direction on my part, a lack of clarity on my part, a lack of understanding on Mr. Soehngen's part, a lack of time for us to have specific attention to some of these things, but the pattern became a fairly significant one, a fairly repetitive one by some time in March.

In summary, it is difficult to be persuaded by Judge Mohan's testimony regarding Soehngen's deficiencies. The performance appraisal that Judge Mohan gave Soehngen included the period of February and March 1989. Therefore, I must take at face value the fully successful rating that she gave him for this period. Her argument that Soehngen was having difficulties, which

led her to the conclusion that he should not converted to a permanent employee, is unpersuasive. I find that at the time the Agency requested approval from OPM to extend Soehngen's internship, he was performing at a fully satisfactory level, which should have caused Agency officials no concern in converting him to a permanent career civil service employee.

Although the Agency did not submit the justification of further training needs for Soehngen when the extension request was submitted in May 1989, they did submit the plan in July or August 1989. Although the provisions of FPM Chapter 362-6 provide that the written request for extension should be submitted no later than 60 days prior to the end of the two year period, the provision is precatory and not mandatory. In my view, the failure of the Agency to submit this justification 60 days prior to the end of the two year period does not constitute harmful error to Soehngen.

However, a review of the justification of further training submitted by the Agency does not justify its position that an extension was in order. In its justification, the Agency contended that Soehngen's change of agencies during his internship resulted in a major modification in career direction. When the justification was submitted, Soehngen had served in the Program Analyst, GS-301-11 position for almost one year. Soehngen testified that no Agency official discussed with him any sort of modification in career development. According to the testimony of Soehngen, he received a positive and favorable mid-year review, which was confirmed by his receipt of the fully successful rating in May 1989.

The Agency mentioned that Soehngen's academic credentials did not prepare him for his current position. The Agency contended in its justification that Soehngen's internship training prior to May 1989 was not sufficient to eliminate the voids in this knowledge, skills and abilities. In analyzing those reasons, it is apparent that the Agency's concerns were not justified. These issues were never discussed with Soehngen prior to August 1989. I would assume that if Agency officials had these concerns, they would have discussed these matters with him. While there might not have been a formal requirement to discuss these matters with him, the failure of Agency officials to do so forms another basis to

disregard the justification. As stated earlier, Judge Mohan's rating of fully successful in May 1989 cannot be overlooked as the significant determining factor the Soehngen was performing all duties required of him.

The Agency alleged the although training opportunities were available to Soehngen, additional training was necessary. However, Soehngen attended all training classes which Judge Mohan requested he attend. Soehngen testified that he attended the National ASPA conference and the Criminal Alien Unit Conference. Soehngen stated he suggested training programs to Judge Mohan, which she approved. Soehngen did not refuse to attend any training that Judge Mohan suggested he attend.

In its justification, the Agency claimed the Soehngen was registered to take a Management Practices Course sponsored by the Agency and a Managerial Negotiating Skills Course sponsored by OPM. The Agency maintained that the Management Practices Course was canceled by the Agency and Soehngen's medical condition prevented him from participating in the OPM course. Soehngen claimed that these two training courses were initiated by him. He testified that he attended the Management Practices Course sponsored by the Agency, but the Managerial Negotiating Skills course had not been offered. Soehngen further explained that he has attended four additional training courses.

It is implausible that training deficiencies prevented Soehngen from successfully completing his PMI program. It is undisputed that Soehngen attended all training courses that he was asked to attend. It is undisputed that Soehngen suggested training courses to Judge Mohan, which he subsequently attended. In essence, Soehngen did whatever he was requested to do regarding the Agency's training needs. Part of the Agency's position was that is canceled training which Soehngen had been scheduled to attend. Obviously, Soehngen was not at fault when the Agency canceled a training program he was scheduled to attend.

In summary, I find that the Agency's argument that Soehngen was in need of additional training is not supported by the evidence. I am persuaded that Soehngen met all of the training requirements that he could possibly meet under the circumstances.

For the Agency to claim that Soehngen's failure to attend the Management Practices Course, which the Agency canceled, prevented him from meeting the training requirement is untenable.

In reviewing the totality of the Agency's justification for Soehngen's PMI extension, I am unpersuaded that it meets the requirements and intent of FPM Chapter 362. FPM Chapter 362-6 states that an extension will be the exception rather than the rule. Soehngen was a fully successful employee, according to the performance appraisal written by his immediate supervisor. Judge Mohan's testimony, which appears to contradict Soehngen's performance rating, does not support a decision to approve the Agency's request to extend his PMI program.

The Agency cannot rely upon the failure of a background investigation to be completed, when the Agency unilaterally requested that the background investigation be discontinued. Even if the background investigation is a requirement for successful completion of the internship,[3] which is dubious at best, the Agency cannot come into this proceeding with unclean hands and support its position.

I find that the Agency violated FPM Chapter 362 by extending Soehngen's PMI for a third year.

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[3] I am not persuaded that FPM Chapter 372 covers the situation in Soehngen's case. Agency officials testified that they know of no regulation that required completion of a background investigation before successful completion of the internship. OPM's Manager also knew of no regulation or requirement to preclude conversion of a PMI employee absent completion of a background investigation.

ALLEGED REPRISAL FOR SOEHNGEN HAVING FILED A GRIEVANCE

Soehngen alleged that his claim of reprisal constitutes a prohibited personnel practice under 5 U.S. C. §2302(b)(9). Soehngen claimed that the PMI extension was the result of his filing a grievance over his performance appraisal on May 12, 1989. Soehngen maintained that he met the four criteria enumerated in Gerlach v. Federal Trade Commission, 8 M.S. P. B 599 (1981). The four criteria set forth in Gerlach, 8 M.S.P.B. at 600-601 indicate that an employee must demonstrate the following to prevail on a reprisal claim:

(1) he engaged in activity protected by 5 U.S.C. §2302(b)(9);

(2) he was treated iwan adverse fashion by the employer;

(3) the deciding officials had actual or constructive knowledge that the employee was engaged in protective activity;

(4) there ia a causal connection between the protected activity and the adverse action and the protected activity was a significant factor in the taking of the adverse action.

While the Agency admits the Soehngen satisfied at least one of the requirements set forth above, they take exception to the allegation that the fourth criteria was met by Soehngen. The Agency contended that under the facts and circumstances surrounding the filing of the grievance and the pursuit of the extension request, there was not any "causal connection" between the grievance and the extension.

Soehngen contended that the request for extension May 23, 1989 was made in response to the filing of the grievance on May

12, 1989. Before a finding of "causal connection" can be made, all of the dates surrounding the request for extension and the filing of the grievance need to be examined.

Although the extension request was not submitted until May 23, 1989, the Agency presented undisputed testimony of meetings that occurred prior to that date concerning the extension request. On April 28, 1980, Judge Mohan had a telephone conversation with Matus about the possibility of an extension request for Soehngen. Matus testified that after her telephone conversation with Judge Mohan, she discussed with Annandale in the Agency's Personnel Office, what information must be contained in an internship extension request. Matus' notes reflect that on May 1 and May 8, she discussed with Annandale about the specifics of such an extension request. On May 10, 1989, Matus and her supervisor, Carroll, met with Judge Mohan to discuss the contents of the letter that the Agency would be sending to OPM for Soehngen's PMI extension request.

All of these meetings described in the preceding paragraph show that the Agency's efforts to request a PMI extension for Soehngen occurred prior to the filing of the grievance on May 12, 1989. The preliminary meetings occurred even prior to Soehngen receiving the performance appraisal, upon which the grievance was filed.

Upon reviewing the dates of the management meetings and the filing of Soehngen's grievance, there can be no doubt the Agency officials commenced discussions on the PMI extension request prior to the filing or the grievance. The unrefuted testimony of Matus and Mohan show conclusively that the Agency decided on the extension request prior to May 12, 198. Therefore, given the timing of these events, there is no possibility that any "causal connection" existed between the filing of the grievance and management meetings to consider and request Soehngen's extension request.

Soehngen's allegation that the Agency acted in reprisal for his filing of a grievance is denied. The Agency decision to extend Soehngen's internship was not based upon an unlawful reprisal.

REMEDY

Having found that management violated the provisions of FPM Chapter 362 by extending Soehngen's PMI appointment, the Grievant is entitled to some remedy. In its post-hearing brief, the Grievant requested the following relief:

(1) a retroactive appointment to August 24, 1989;

(2) A retroactive appointment to a GS-12 position commencing on his conversion to a permanent career civil service position;

(3) an award of back pay consisting of the difference between what he is currently being paid in his GS-11 position and what he would have received on proper conversion;

(4) a grant of attorneys fees based upon the Back Pay Act, 5 U.S.C. §5596.

I have considered the requested remedies suggested by Soehngen. Having found that the Agency violated FPM Chapter 3 , I find that Soehngen is entitled to retroactive appointment to August 24, 1989. Soehngen should be converted to a permanent career Civil Service position based upon his successful completion of the PMI program.

I find that the other three remedies suggested by Soehngen are not appropriate. Chief Judge Robie testified that conversion from the PMI program to a career civil service position does not entitle the employee to automatic promotion. He further testified that the Agency has not promoted everyone immediately who has successfully completed the PMI internship. This testimony was unrefuted. Therefore, I find that it is within the Agency's discretion to determine when and if Soehngen should be promoted to the GS-12 level.

Having found that promotion to the GS-12 level is within the discretion of the Agency, Soehngen is not entitled to any back pay under the Back Pay Act, 5 U.S.C. §5596. Therefore, no attorney fees can be warranted.

FINDINGS AND RECOMMENDATIONS

After considering all of the evidence presented, including the arguments raised in the post-hearing brief, I find that:

1. The Agency violated FPM Chapter 362 by extending Richard Soehngen's Presidential Management Internship for a third year;

2. The Presidential Management Internship extension was not an unlawful reprisal for Richard Soehngen having filed a grievance on May 12, 1989.

I recommend that:

1. Richard Soehngen be retroactively converted to a career civil service position at the GS-11 level as of August 24, 1989;

2. Richard Soehngen is not entitled to any retroactive appointment to the GS-12 level.

3. Richard Soehngen is not entitled to an award of back pay;

4. The request for attorneys fees under the Back Pay Act, 5 U.S.C. §5596 be denied.

Roger P. Kaplan
Fact-Finder

APPENDIX H

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

RICHARD C. SOEHNGEN, Appellant, v. DEPARTMENT OF JUSTICE, Agency.	)	DOCKET NUMBER DC07529010604 DATE: OCT. 16 1990

Steven L. Murray, Esquire, Neill, Mullenholz & Shaw, Washington, D.C., for the appellant.

Mary E. Magee, Esquire, Washington, D.C., for the agency.

BEFORE

Elizabeth B. Bogel
Administrative Judge

INITIAL DECISION

The appellant filed an appeal alleging that the August 24, 1990, expiration of his appointment as a Presidential Management Intern, GS-11, Executive Officer for Immigration Review, Office of the Chief Immigration Judge, was retaliation against him for

engaging in whistleblowing activities in violation of 5 U.S.C. §2302(b)(8). For the following reasons, the appeal is DISMISSED.

Under 5 U.S.C. §7701(c), an individual may appeal to the Board from any action which is made appealable to the Board under any law, rule or regulation. The Board has no plenary jurisdiction; rather, its jurisdiction is limited to those areas specifically granted by statute regulation. *Cowan v. United States*, 710 F.2d 803, 805 (Fed.Cir. 1983). No such grant of jurisdiction exists for a separation which is the result of the expiration of a time limited appointment.

The appellant argued that the expiration of his appointment was a termination and that, as preference eligible employee, he was entitled to the procedural protections of 5 U.S.C. Chapter 75. Since the "termination" was effected without any such procedures, he argued, the agency has committed reversible procedural error.

The appellant argued, without contradiction, that he entered the Presidential Management Internship (PMI) program on August 24, 1987, as a Program Analyst for the Department of the Army, and transferred within the program on January 11, 1988, to the Executive Office for Immigration Review. At the completion of a two-year internship, an agency must take action to convert, extend or terminate interns. Federal Personnel Manual (FPM), Chapter 352, at 2-7a. At the end of the appellant's two-year internship, the Executive Office for Immigration Review chose to extend his internship for a third year. See Appellant's request, Attachments 7-9.

At the end of the third year, the appellant's appointment expired. Upon the expiration of the appellant's appointment, the conditions for termination specified in FPM Chapter 362, at 2-8 applied. See Appellant's request, Attachment 8. That paragraph provides in pertinent part:

. . . the employing agency may, with no break in service, convert the intern to the competitive service or extend the internship with prior approval from [Office of Personnel Management]. If neither of those actions is taken, the PMI appointment terminates.

The same paragraph stated that removal actions for unacceptable performance or for misconduct against preference eligibles must be taken under 5 U.S.C. Chapters 43 and 75, respectively. The appellant argued that he has been removed, and, thus, the agency was required to use Chapter 75 procedures.

There is no basis for interpreting FPM Chapter 362, paragraph 2-8 as requiring the use of Chapter 75 procedures at the expiration of a PMI appointment. The plain language of the paragraph states that if no action is taken by the agency upon the expiration of an appointment, the appointment terminates. Clearly, the agency is required by the terms of that paragraph to use the procedures in Chapters 43 and 75 only in the event it must remove an intern prior to the expiration of the appointment for unacceptable performance or misconduct.

The Board has consistently held that, when an expiration date of an appointment is specified as a basic condition of employment, the expiration of the appointment is not an adverse action appealable to the Board. Moreover, an agency's consideration of an appellant's performance or conduct in deciding not to reappoint him does not invoke the Board's jurisdiction. *See Meade v. Federal Deposit Insurance Corporation*, 41 M.S.P.R. 191, 193 (1989); *Shelton v. Federal Deposit Insurance Corporation*, 38 M.S.P.R. 303, 306 (1988); *Berger v. Department of Commerce*, 3 M.S.P.R. 198, 199, (1980). In this case, it is clear that the appellant originally accepted a two-year PMI appointment and that, with notice to the appellant, the agency extended the appointment by one more year. Accordingly, I find that the time limitation was a basic condition of the appointment, and the appellant was at all times aware of it.

The appellant argued that agency assurances to him about the probability of conversion to a competitive appointment gave him "a clear expectation of continued employment." This expectation was bolstered, he argued, by the provisions of FPM Chapter 362 which permit conversion as long as the employee has performed satisfactorily with the agency. FPM Chapter 362 provides that an employee is eligible for conversion to a career or career-conditional appointment if:

> (1) The employee has successfully completed a Presidential Management Internship at the time of conversion; and (2) the employee is recommended for conversion at least 90 calendar days before the completion of the internship. The agency decides whether or not to convert the employee.

FPM Chapter 362 at 2-7b. Clearly, the agency retains the discretion to decide whether to convert an employee even where the employee is performing satisfactorily. I find no evidence that the appellant has a "clear expectation of continued employment." Even if I had found that the appellant had such an expectation, procedural protections provided by statute do not attach on the basis of an employee's expectation no matter how reasonable it might be. *Of. White v. Department of the Air Force*, 32 M.S.P.R. 590, 593-94 (1987) *aff'd* 835 F.2d 871 (Fed.Cir. 1987)(Table).

The appellant has not met his burden of proving that the expiration of his PMI appointment was an action over which the Board has jurisdiction. Because the appellant's separation was not an otherwise appealable action, the Board does not have jurisdiction to consider his claim that the agency retaliated against him because of whistleblowing activities. *See Wein v. Department of the Navy*, 37 M.S.P.R. 379, 381 (1988).

The Board would have jurisdiction over the appellant's whistleblower claim in an individual right of action appeal, however, before bringing such an appeal to the Board the appellant must first seek corrective action from the Special Counsel. See 5 U.S.C. §1221(a); 5 C.P.R. §1209.2(b)(1).[1] Since there is no evidence that the appellant has sought corrective action from the

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[1] On July 12, 1990, the Board published its final regulations implementing the Whistleblower Protection Act in the Federal Register. Citations in this order will be to the Board's regulations at 5 C.F.R. Part 1209; however, parties should refer to 55 Fed. Reg. 28,591 - 28,593 (1990) for the text of all references to this part.

Special Counsel, the Board does not have jurisdiction to entertain his claim as an individual right of action appeal.

DECISION

The appeal is DISMISSED.

FOR THE BOARD:

Elizabeth B. Bogle
Administrative Judge

NOTICE TO APPELLANT

The initial decision will become final November 20, 1990, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 802
Washington, DC 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that your have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

APPENDIX I

Fact-Finder's Report on Grievance
January 23, 1991

To: William P. Barr
Deputy Attorney General

FROM: Harry F. Flickinger
Assistant Attorney General for Administration

Attached for your review is a copy of the Fact Finder's report and recommendations pertaining to the grievance submitted by Richard C. Soehngen under the provisions contained in Deparment's administrative grievance procedure contained in Department of Justic (DOJ) Order 1771.1B. Until the expiration of his appointment as a Presidential Management Intern (PMI) on August 24, 1990, Mr. Soehngen was employed by the Executive Office for Immigration Review (EOIR) as Program Analyst, GS-301-11.

On September 20, 1989, Mr. Soehngen filed a grievance with EOIR Director David L. Milhollan concerning a 1-year extension of his appointment as a PMI. Since Mr. Milhollan did not grant the relief sought by Mr. Soehngen, in accordance with DOJ Order 1771.1B you were designated as the deciding official in this grievance. Additionally, since the facts of the grievance were in dispute, a Fact Finder was appointed on your behalf. The essential facts of the case follow.

The PMI program is designed to attract to the Federal service superior men and women from a variety of academic disciplines. A PMI is given a 2-year temporary appointment in the excepted service. Upon satisfactory completion of the intership, the PMI is eligible for conversion to a permanent career or career-conditional appointment within the same agency. The U.S. Office of Personnel Management (OPM) issues Government wide regulations for the PMI program in Federal Personnel Manual (FPM) Chapter 362. Those regulations provide, among other things, for the extension of an internship for up to one year in

situations which require additional time for the training and development of an intern.

Mr. Soehngen became a PMI on August 24, 1987, as a Program Analyst with the Department of the Army in Falls Church, Virginia. On January 11, 1988, Mr. Soehngen transferred from the Department of the Army to EOIR to assume the position of Management Officer in El Paso, Texas. Mr. Soehngen was resassigned to the position of Program Analyst at EOIR's Falls Church, Virginia headquarters in August 1988. From his reassignment to the expiration of his appointment, Mr. Soehngen worked under the supervision of Assistant Chief Immigration Judge Mary Ann Mohan.

On May 3, 1989, Mr. Soehngen recieved a fully successful performance rating from Ms. Mohan for the rating period September 1, 1988 through March 31, 1989. On May 12, 1989, Mr. Soehngen filed a request for review of his rating (later determined to be a performance rating grievance) with the reviewing officials, EOIR Chief Immigration Judge William Robie.

In late April 1989, EOIR determined that it would be necessary to request a 1-year extension of Mr. Soehngen's intership because he had not served in the position of Program Analyst for a sufficient amount of time to recommend his conversion to the competitive service. OPM's regulatory guidance requires that requests for extensions of internships be submitted no later than 60 days prior to the end of the intial 2-year period. A written request to extend the intership from August 24, 1989 to August 24, 1990 was therefore submitted to OPM by the Department's Personnel Staff on May 23, 1989. OPM approved the request on May 26, 1989.[1]

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[1] When the extended appointment expired on Augst 24, 1990, Mr. Soehngen was not converted to a career or career-conditional appointment. As a result, Mr. Soehngen is no longer an employee of the Department. Allowing a temporary appointment to expire at the end of its term is not an adverse action directly appealable to the Merit Systems Protection Board (MSPB). Therefore, when

As noted above, Mr. Soehngen filed this grievance over the 1-year extension of his intership on September 20, 1989. The parties stipulated that the tow issues were (1) whehter the extension was contrary to regulation and (2) whether it was in retaliation for his having filed the earlier grievance over his performance rating. The Fact Finder assigned to the grievance, Roger P. Kaplan, concluded that the Department violated FPM Chapter 362 by extending Mr. Soehgnen's intership for one year. Mr. Kaplan found, however, that no prohibited personnel practice has occurred -- that the extension was not in retaliation for Mr. Soehngen's having filed a performance rating grievance. As a remedy, the Fact-Finder recommended that the 1-year extension be voided and that Mr. Soehngen's having filed a performance rating grievance. As a remedy, the Fact Finder recommended that a 1-year extension be voided and that Mr. Soehngen be converted retroactively to a career appointment effective August 24, 1989, and that he be awarded attorney's fees. For the reasons which follow, we do not belive the Fact Finder's recommendations should be accepted.

First, the Department does not have the authority to approve PMI extensions; that authority rests solely with OPM. It is not possible therefore, for the Department to have violated FPM Chapter 362 by extending Mr. Soehngen's intership. OPM established the guidelines for the administration of the PMI program and specifically approved the Department's request for an extension of Mr. Soehngen's intership. There is not indication in the Fact Finder's report that the Department in any way misled OPM in requesting the extension. In effect, Mr. Kaplan has second-guessed OPM's determination that an extension was warranted,

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Mr. Soehngen challenged the decision not to convert his appointment, he did so by filing a prohibited personnel practice complaint with the MSPB's Special Counsel, alleging that the decision was in retaliation for whistle-blowing. This complaint, which is distinct from the grievance over the extension of the internship, is still pending decision, although Mr. Soehngen's initial request for a stay was not granted.

substituting his own judgment for that of the agency charged with governtment-wide administration of the program. In view of the fact that OPM developed and oversees the PMI program, we think there is a real question whether a Fact Finder engaged by the Department is within the scope of his authority in finding that an action by OPM is inappropriate.

Furthermore, we believe that once Mr. Kaplan determined that the request for an extension was not illegally motivated, he should have recommended that the grievance be denied. As long as such a management decision is not illegally motivated, is should not be subject to third-party review. Instead, such a determination should be left to management's discretion. Therefore, management need not show that the decision to request the extension was necessary or even wise, as long as the grievant cannot show that it was illegally motivated. Lastly, we believe that even though the Department was not required to do so, the Department did show that extension was necessary. The record indicates, in our opinion, that Mr Kaplan erred in determining that the Department had no basis for requesting the extension.

Finally, we think is significant that Mr. Soehngen's appointment could been allowed to lapse after two years rather than being extended for an additional year. In effect, rather than terminating his appointment at that point, he was given the benefit of a second chance. Had the appointment been allowed to lapse after the intial 2-year appointment, Mr. Soehngen would not have been allowed to grieve that action under the administrative grievance procedure. Rather, his only recourse would have been to file a prohibited personnel practice complaint with the Special Counsel, just as he is doing now that the extended appointment was allowed to expire. EOIR should not be penalized for extending the appointment rather than terminating it by having the Fact Finder's recommendation serve as a back door through which Mr. Soehngen could get the relief which he must try to obtain from the Special Counsel.

While, according to DOJ Order 1771.1B, Fact Finder's recommendations are normally accepted, we believe there are compelling reasons here not to follow that course. The

Department's grievance procedure provides that if the deciding official determines that a Fact Finder's recommendation should be rejected, he seek the concurrence of a higher level official. Therefore, if you agree with this recommendation, the concurrence of the Attorney General must be obtained. I have attached a memorandum which you may use for this purpose.

Attachment

U.S. Department of Justice
Office of the Deputy General

The Deputy Attorney General — Washington, D.C.

MEMORANDUM — February 2, 1991

TO: Dick Thornburgh
Attorney General

FROM: William P. Barr s>
Deputy Attorney General

SUBJECT: Fact-Finder's Report on Grievance

I was designated as the deciding official with respect to a grievance filed by Richard C. Soehngen of the Executive Office for Immigration Review. Mr. Soehngen grieved the extension of his appointment as a Presidential Management Intern for an additional year instead of being converted to a permanent position in the competitive service. The Fact Finder designated to submit a report and recommendation has recommended that the grievance be granted, and that Mr. Soehngen be retroactively converted to a permanent position.

For the reasons included in the attached memorandum, I have concluded that the Fact Finder's recommendation should not be accepted. Under the terms of the Department's administrative grievance procedure, DOJ Order 1771.1B, a higher level official must concur with a deciding official's determination not to accept a Fact Finder's recommendation. Accordingly, I request that you concur in my determination.